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Children Watching Television Advertising: What's Wrong with This Picture

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Children Watching Television Advertising: What's Wrong with this Picture?

by
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"Children watch and enjoy commercials long before they are interested in programs, because commercials are often the best produced and most imaginatively conceived moments on TV."[1]

Introduction

Today's children watch a great deal of television. In 1985, the average child between the ages of two and eleven watched approximately four hours of television per day, or twenty-eight hours per week.[2] Those same children spent almost one-fifth of that viewing time watching advertisements.[3]

Since the passage of the Communications Act of 1934,[4] the Federal Communications Commission (FCC) has monitored the content of both programming and advertising on television. In 1960, the FCC first identified children as a specialized audience whose interests should be carefully considered by stations and advertisers.[5] In 1974, after extensive research and consultation with parent and consumer groups, the FCC issued the first set of detailed regulations governing children's television.[6]

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1. FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 79 (1978) [hereinafter 1978 FTC REPORT], (statement of Joan Ganz Cooney, President, Children's Television Workshop, and Producer, *Sesame Street*).

2. Kunkel & Watkins, *Evolution of Children's Television Regulatory Policy,* 31 J. BROADCASTING & ELECTRONIC MEDIA 367 (1987) (citing the 1986 NIELSEN REPORT ON TELEVISION). It has been calculated that by the time a young person graduates from high school, she will have watched, on average, 15,000 hours of television compared to only 11,000 hours spent in classroom instruction. *Id.*

3. Condry, Bence & Scheibe, *Nonprogram Content of Children's Television,* 32 J. BROADCASTING & ELECTRONIC MEDIA 255, 265 (1985).

4. 47 U.S.C. §§ 151-609 (1983).

5. Report and Statement of Policy in re Commission Programming Inquiry, 20 Rad. Reg. (P & F) 1901 (1960).

6. In re Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974) [hereinafter 1974 *FCC*

Recently, however, the FCC's position has changed radically. Mark Fowler, appointed FCC Chairman by President Ronald Reagan in 1980, vowed in his opening address that the government would henceforth be a spectator rather than a dictator of program content.[7] The former Chairman has also referred to the FCC as "one of the last of the New Deal dinosaurs,"[8] and has consistently argued that the traditional regulatory function of the Commission is both unproductive and obsolete.[9] In keeping with this spirit, the FCC eliminated all quantitative commercial guidelines for television broadcasting,[10] declaring that "commercial levels will be effectively regulated by marketplace forces."[11]

For a brief period, the Federal Trade Commission (FTC) was also interested in the regulation of children's television, although it concentrated its attention on advertising only. Beginning in 1978, the FTC considered implementation of a series of rules, the most far-reaching of which was a proposal to ban all televised advertising that would be seen by an audience composed of a significant portion of children too young to evaluate it.[12] After intense and litigious debate, in 1981 the FTC concluded that it should not attempt any regulation of children's television advertising.[13]

The movement for regulating children's television has not lost its momentum, despite the official non-cooperation of the FCC and FTC. The most recent battleground was the proposed Children's Television Advertising Practices Act of 1988,[14] which passed both congressional houses,[15] but was vetoed by President Reagan after Congress adjourned.[16] The proposed legislation would have required the FCC to re-

Report], *recon. denied* 55 F.C.C.2d 691 (1975), *aff'd sub nom.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

7. Address by Mark S. Fowler, FCC Chairman, National Association of Broadcasters Annual Convention, Las Vegas, Nev. at 5 (April 17, 1985), *quoted in* O'Brien, *The Responsibility of The Electronic Press to Juvenile Audiences,* 15 SW. U.L. REV. 653, 658 (1985).

8. Black, *The Deregulatory Revolution,* BUS. OF COMM., Sept.-Oct. 1984, at 54.

9. *See, e.g.,* Fowler & Brenner, *A Marketplace Approach To Broadcast Regulation,* 60 TEX. L. REV. 207, 209 (1982).

10. In re The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076 (1984).

11. *Id.* at 1105.

12. 1978 FTC REPORT, *supra* note 1, at 10.

13. In re Children's Advertising, FTC Final Staff Report and Recommendation, 43 Fed. Reg. 17967 (1981) [hereinafter 1981 FTC Final Report].

14. H.R. 3966, 100th Cong., 2nd Sess., 134 CONG. REC. H3979 (daily ed. June 7, 1988).

15. 134 CONG. REC. H4010 (1988); 134 CONG. REC. S16857 (1988).

16. Memorandum of Disapproval for the Children's Television Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1456 (Nov. 5, 1988).

store regulation of television advertising directed at children, using the pre-1984 FCC guidelines as a model.[17]

This Note examines the proposed legislation, the rationale for specific regulations, and the reasons for deregulation in general. It also suggests possible alternatives to FCC involvement that would effectively protect children from the exploitation of unscrupulous advertisers.

In addition, this Note demonstrates that the most cogent argument for regulation is that television advertising directed at children is deceptive, but that this premise has not been substantiated by its supporters and has been ignored by those who favor deregulation. Accordingly, the Note concludes that this issue—whether, and to what extent, television advertising practices directed at children are deceptive—should be litigated under federal or state deceptive advertising statutes, and that congressional regulation is not called for until a rational basis for regulation has been established.

I
The Proposed Legislation

The vetoed Children's Television Advertising Practices Act would have required the FCC to institute proceedings intended to result in a specific set of rules governing children's television advertising.[18] The proposed Act also set out minimum standards and objectives.[19]

At the very least, the FCC would be compelled to require licensees to: (1) limit the percentage of advertising on children's television to 9.5 minutes per hour on weekends and 12 minutes per hour on weekdays; (2) ensure an adequate separation between program content and commercial messages;[20] and (3) eliminate "host-selling," "tie-ins," and "program-length commercials."[21]

"Host-Selling" is the practice of having the program talent deliver the commercial pitch.[22] A "tie-in" is the linking of the subject of a commercial to a program theme by prominently displaying a brand name product on the set of a television show.[23] The "program-length commercial" is an attempt by advertisers to avoid the rules mandating a fixed

17. 134 CONG. REC. S955 (1988).

18. *Id.*

19. *Id.*

20. This distinction is especially problematic for younger children: the FCC suggested that in order to aid children in identifying commercial messages, the station should announce the beginning and end of every advertisement, clearly labelling it as such. 1974 FCC Report, *supra* note 6, at 15.

21. 134 CONG. REC. S955 (1988).

22. *Id.* at 8.

23. *Id.*

percentage of advertising time to program time. Typically, a commercially available product is used as a central character in a program, which is often totally funded by the toy distributor.[24]

The proposed legislation also addressed the problem of interactive television shows,[25] the newest trend in children's television. Through inaudible signals inserted into the transmission, children can interact with the program if they purchase a special toy capable of picking up the signals.[26]

Legislators clearly identified the reason for the proposed Act: children were being victimized by commercialism, which was defeating the public interest. Senator Howard Metzenbaum (D-Ohio), introducing the proposed regulations to the Senate, stated unequivocally that increased commercialism is "keeping quality [children's] programming off the air."[27] The congressional record demonstrates a high level of outrage that children are exposed to unnecessary levels of commercialism. The frequent use of such adjectives as "shameful," "absurd," "wrong," and "disgraceful" in the debate implies an unspoken assumption that in the most perfect world, children should not be exposed to advertisements at all.[28]

II
Regulatory Jurisdiction of the FCC and FTC

The FCC is authorized to license broadcasters if such a grant would serve the "public convenience, interest, or necessity,"[29] and to deny an application or revoke a license where the licensee has failed to meet this standard.[30] It may also act to prevent the knowing transmission of "false or deceptive signals or communications."[31]

The FTC's jurisdictional base somewhat overlaps that of the FCC, as the former's statutory obligation is to prescribe "rules and general statements of policy with respect to unfair or deceptive acts or practices."[32]

24. *Id.*
25. *Id.*
26. Charren, *Children's Television Advertising: Whose Hand Rocks The Cradle?*, 56 U. CIN. L. REV. 1251, 1253 (1988).
27. 134 CONG. REC. S955 (1988).
28. *See id.* (Sen. Howard Metzenbaum (D-Ohio) intoducing the proposed act to the Senate); 133 CONG. REC. E3585 (1987) (Rep. Terry Bruce (D-Ill.) introducing the proposed bill into the House of Representatives).
29. 47 U.S.C. § 307(a) (1985).
30. *Id.* §§ 309(a), 310(b), 312.
31. *Id.* § 303(m)(1)(D)(1).
32. 15 U.S.C. § 57(a) (1985).

The FCC generally defers to the FTC in matters of deceptive advertising,[33] although it has emphasized that a licensee's compliance with FTC policy will be part of the review as to whether a licensee has operated in the "public interest."[34] A 1972 Liaison Agreement between the FCC and the FTC recognizes that, with a few exceptions, the FTC is primarily responsible for the regulation of unfair or deceptive advertising, and that the FCC is primarily responsible for ensuring that the overall operation of broadcast licensees is consistent with the "public convenience, interest and neccessity."[35]

In sum, then, it is clear that the FTC and FCC have concurrent jurisdiction to regulate children's television advertising.[36] If television advertising directed at children is contrary to the public interest, convenience or neccessity, then the FCC should regulate the advertising. If the advertising is unfair or deceptive, then the FTC should act. The Liaison Agreement serves to reinforce the concurrent jurisdiction of both agencies by avoiding conflict between them.

III
Arguments For Regulation

The initial impetus to regulate children's television was the anxiety generated by the growing level of violence on television programs watched by children.[37] As a result of widespread public unease, Action for Children's Television (ACT), a public interest group that is still one of the major players in the controversy, was formed in Boston in the late 1960s.[38]

ACT soon realized that the real villain in children's television was not violence, but commercialization.[39] Thus, since the early 1970s, ACT's position has been that advertising to young children is "inherently deceptive."[40] ACT claims that children below the age of seven understand neither the nature nor purpose of commercial messages.[41] As children cannot distinguish advertisements from program content, they are

33. In re Complaint by Consumers Ass'n of D.C. concerning CBS, Inc. and WTOP-TV alleging False, Misleading or Deceptive Advertising, 32 F.C.C.2d 400, 404, 405 (1971).

34. *See* In re Complaint of Alan F. Neckritz and Lawrence B. Ordower Concerning Fairness Doctrine *in re* Stations KGO-TV, KPIX, KNBC and KNXT, 29 F.C.C.2d 807, 810, 814 (1971).

35. Liaison Agreement, Trade Reg. Reg (CCH). ¶ 9852 (1972).

36. 1978 FTC REPORT, *supra* note 1, at 234.

37. Kunkel & Watkins, *supra* note 2, at 374.

38. *Id.*

39. *Id.* at 373.

40. Charren, *supra* note 26, at 1252.

41. 1981 FTC Final Report, *supra* note 13, at 8, 26.

clearly being deceived.[42] Moreover, ACT argues that even older children (between the ages of seven and twelve), who can distinguish selling from entertainment, are being deceived. Children are prone to accept any role model, and consequently place unwarranted trust in the salesperson.[43] Additionally, they are poorly equipped to make informed choices even if presented with all the relevant information.[44]

Regulating deceptive advertising would benefit not only children, who would otherwise be confused, but also consumers and sellers. Consumers would benefit because deceptive advertising confuses the marketplace and leads to competition between advertisers that is irrelevant to quality or price.[45] Sellers would benefit because the consumers' confidence in the credibility of the marketplace is reinforced; this credibility is essential to effective advertising.[46]

A secondary argument for regulation is the negative effect of children's television advertising on the relationship between children and their parents. When the FCC opened its docket in 1971 for comments on a proposal to ban all advertising directed to children on television, it received over 100,000 letters, ninety percent of which were hostile to advertising. This was the largest volume of mail that the FCC had ever received on any one subject.[47]

Advertising is directed toward children, but is effective only if the children bring pressure on the parents to buy. One advertising executive put it as follows:

> When you sell a woman on a product and she goes to the store and finds the brand isn't in stock, she'll probably forget about it. But when you sell a kid on the product, if he can't get it, he will throw himself on the floor, stamp his feet and cry. You can't get a reaction like that out of an adult.[48]

Commentators have noted that this pressure promotes confrontation and alienation between parents and children, and undermines the parents' child-rearing responsibilties;[49] the parent is constantly compelled to deny

42. *Id.*, pointing out that young children distinguish between commercials and programs solely on the basis of relative duration.

43. *Id.* at 21.

44. 1978 FTC REPORT, *supra* note 1, at 226.

45. *Deception: FTC Oversight: Hearing before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 98th Cong., 2d Sess. 31, 106 (1984).

46. *See* ADVERTISING AGE, Oct. 25, 1982, at 85.

47. *Id.*

48. 1978 FTC REPORT, *supra* note 1, at 93.

49. *Id.* at 102 (quoting *Hearings Before the Senate Select Subcomm. on Nutrition and Human Needs,* 93rd Cong., 1st Sess. (1973) (statement of Sidney Berman, M.D., former president of the American Academy of Child Psychiatry)).

the child access to things that another authority—television—has characterized as accessible and desirable.[50]

Advertisers trying to persuade children to want to possess things have found their task remarkably easy. Parents thus become figures of repressive authority who must continually frustrate their children's desires. Regulating the level of commercials at least limits the number of desires that advertisers can create, and thus allows more time for the parent to assume a supportive, rather than a repressive, role in raising the child.

IV
Arguments Against Regulation

A. The FTC

As noted above, the FTC opened its rulemaking proceedings in 1978 with the *FTC Staff Report on Television Advertising to Children* (the *"1978 FTC Report"*).[51] The FTC terminated the inquiry in 1981 without promulgating any rules, with the *FTC Final Staff Report and Recommendation in the Matter of Children's Advertising* (the *"1981 FTC Final Report"*).[52]

Although both reports considered the broad issue of children's television advertising in general, they concentrated particularly on the promotion of candy, sugared snacks, and sugared cereals. This narrow focus can be explained in part by the fact that the arguments in favor of regulation in this area are strengthened by the claim that such products are harmful to children's health.[53]

In the *1978 FTC Report*, the FTC concluded that televised advertising of any product to an audience too young to understand the nature of a commercial message "is inherently . . . deceptive and unfair,"[54] thus accepting the basic argument of ACT. Only three years later, the *1981 FTC Final Report* concluded that although television advertising aimed at children (1) manipulated children into placing indiscriminate trust in the advertised message; (2) misled children as to the persuasive purpose of advertising; and (3) used techniques that left children unable to evaluate the information offered in an effective way, it was not neccessarily deceptive or unfair.[55] The FTC terminated its proceedings, noting that

50. *Id.* at 104.
51. 1978 FTC REPORT, *supra* note 1.
52. 1981 FTC FINAL REPORT, *supra* note 13.
53. 1978 FTC REPORT, *supra* note 1, at 7, 47-48.
54. *Id.* at 157.
55. 1981 FTC Final Report, *supra* note 13, at 2.

the only remedy available was a total ban on all television advertising directed at children, and that such a ban was impractical.[56]

Backpedalling on its earlier findings, the FTC stated: "Because of this remedial impediment [sic], there is no need to determine whether or not advertising directed towards young people is deceptive."[57] Without reaching the "inherently deceptive" argument that it had earlier accepted, the FTC concluded in 1981 that it could not find a remedy for the problem for two main reasons: first, a total ban on children's television advertising would be impractical; and second, a ban on the advertising of sugared foods would be impractical.[58]

In arguing the case for the impracticability of a total ban, the FTC relied on a careful division of children into two groups: "young" (aged two to five) and "old" (aged six through twelve).[59] The FTC claimed that only "young" children needed protection, because they lacked the cognitive awareness to distinguish between commercial pitch and program content.[60] Ignoring the argument that "older" children also need protection because of their limited ability to evaluate advertised information, the FTC found that it could not effectively target only programming that would be watched by a substantial audience of "young" children because so many "older" children also watched the same programs.[61]

Nor could the FTC clearly distinguish between advertisements aimed at "young" children and those aimed at "older" children.[62] Thus, implying that "older" children did not need protection from commercials and indeed had a right to receive advertisements, the FTC found it impractical to ban advertisements directed at "young" children without infringing on the viewing rights of the "older" group.

The FTC's second reason for withdrawing from a rulemaking role addressed the proposed ban on advertising sugared foods. While conceding that sugar played an important part in promoting tooth decay,[63] the FTC concluded that the lack of specific information as to the extent to which the incidence of dental cavities was affected by particular levels of sugar in foods made it impractical to regulate the advertisement of sugared foods with sufficient specificity.[64]

56. *Id.*
57. *Id.* at 3-4.
58. *Id.* at 37, 82.
59. *Id.* at 16 (citing the developmental theories of child psychologist Jean Piaget).
60. *Id.* at 2, 24, 39.
61. *Id.* at 37.
62. *Id.* at 42.
63. *Id.* at 82.
64. *Id.* at 85.

Thus, the FTC used "impracticability" as a reason not to regulate advertising that, only three years before, it had unequivocally labelled "inherently both deceptive and unfair."[65] More significantly, the FTC failed to address possible remedies other than a total ban, so that the many other arguably deceptive practices of advertisers were simply left unchallenged.[66]

B. The FCC

The FCC opened its docket on the regulation of children's television, including advertising practices, in 1971[67] at the instigation of ACT. In 1974, the Commission published its first set of guidelines in the *Children's Television Report and Policy Statement* (the *"1974 FCC Report"*).[68] In addition to its mandate under the 1934 Communications Act to act in the public interest, convenience, and necessity,[69] the Commission noted that children were a special audience, and that broadcasters had an affirmative duty as trustees of a valuable resource, *i.e.*, the airwaves, to meet the special interests of the child audience.[70]

The *1974 FCC Report* rejected ACT's proposal to ban all advertising directed at children, arguing that this ban would eliminate funding for children's programs and thus undermine both the quality and quantity of children's television.[71] Without establishing its own rules, the Commission recommended that the industry adhere to the standards of the National Association of Broadcasters Television Code (the "NAB Code").[72] Noting that the FTC was concurrently considering proposals to deal with unfair or deceptive advertising and deferring to that body's expertise and jurisdiction in that area,[73] the FCC concluded that it would expect the industry to follow the NAB Code. The Commission planned further action if voluntary self-regulation did not work.[74]

In 1979, the FCC reviewed the situation, finding that self-regulation had worked because "voluntary" adherence to the NAB code had effectively limited commercial time, had caused stations to separate program content from commercial message, and had eliminated abusive practices

65. 1978 FTC REPORT, SUPRA note 1, at 157.

66. *See* Silberstein, *Deregulation and Children's Advertising,* 1985 ANN. SURVEY OF AM. L. 603, 605 (1988).

67. In re Children's Television Programs, Notice of Inquiry and Notice of Proposed Rulemaking, 36 Fed. Reg. 1429 (1971).

68. 1974 FCC Report, *supra* note 6.

69. *See supra* note 29 and accompanying text.

70. 1974 FCC Report, *supra* note 6, at 5.

71. *Id.* at 11.

72. *Id.* at 13.

73. *Id.* at 9.

74. *Id.* at 14.

such as tie-ins and host-selling.[75] However, that same year, the antitrust division of the Justice Department sued the NAB Code Authority for violating the Sherman Antitrust Act.[76] Because only one provision of the NAB Code was held to be an illegal restraint of trade,[77] ACT requested that the court reinstate those parts of the Code relating to children's television advertising. The court refused the request;[78] effectively, the NAB Code was abandoned.[79]

Finally, in a 1984 report, which revised programming and commercialization policies and requirements (the *"1984 FCC Revision"*), the FCC withdrew all quantitative commercial guidelines for television broadcasting.[80] Explaining that the withdrawal of guidelines included those affecting children's television, the Commission stated that "[e]limination of the policy is consistent with the Commission's general de-emphasis regarding quantitative guidelines engendered in the [*1984 FCC Revision*]. Moreover, the Commission has consistently noted the importance of advertising as a support mechanism for the presentation of children's programming."[81]

ACT challenged this withdrawal of guidelines and successfully contended that the FCC had failed to justify the deregulation.[82] The court of appeals remanded the action to the FCC to supply a "reasoned basis" for its decision.[83] Commentators have noted, however, that the court simply sent the case back to the FCC for a fuller explanation of the reasons for deregulation than the cursory statement that had been provided, and that rather than a judicial challenge to deregulation of children's television advertising, the decision is simply a criticism of sloppy FCC staff work.[84]

75. Television Programming for Children: A Report of the Children's Television Task Force, released Nov. 2, 1979, *cited in* In re Children's Television Programming and Advertising Practices, Notice of Proposed Rulemaking, 75 F.C.C.2d 138, 139 (1979).

76. United States v. Nat'l Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982).

77. *Id.* at 170.

78. United States v. Nat'l Ass'n of Broadcasters, 553 F. Supp. 621, 624 (D.D.C. 1982).

79. *See* Brosterhous, *U.S. v. National Association of Broadcasters: The Deregulation of Self-Regulation,* 35 FED. COMM. L.J. 324 (1983).

80. In re the Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076 (1984) [hereinafter 1984 FCC Revision].

81. In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Memorandum Opinion and Order, 103 F.C.C.2d 358, 370-71 (1986).

82. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

83. *Id.* at 744, 750.

84. Kent, *Deregulation Order on Children's Television Advertising Remanded to the FCC,* 17 198 N.Y.L.J. 1 (July 24, 1987).

The FCC has not yet provided a "reasoned basis," as ACT demanded,[85] to explain why children, who in 1974 were a special audience whose interests were to be considered by broadcasters as if they were trustees, are adequately safeguarded by market forces now. However, the marketplace theory, the abandonment of the trustee model, the increased first amendment rights of broadcasters, and the general political move toward deregulation[86] are the likely suspects to be marshalled by the FCC in justifying its actions.[87]

C. The Marketplace Theory

The consumer is best served by a system which provides the greatest free choice in available products and services.[88] Although Americans have generally relied on free markets to provide this range of choice in their goods and services, they have not allowed these forces to operate freely in the broadcasting industry.[89] Broadcasting is a business, however, and consumers (the viewing public) benefit from having the widest choice possible.[90] Thus the public interest, necessity, and convenience are best achieved by allowing consumers to choose for themselves, not by making choices for consumers.[91]

In *FCC v. Sanders Brothers Radio Station,*[92] a station owner protested that the FCC's decision to license an additional local radio station in the same area would economically harm his station. The Supreme Court found that encouraging such economic rivalry, to the detriment of the complaining station, was within the mandate of the FCC, commenting:

> [T]he field of broadcasting is one of free competition . . . . The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he can show his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.[93]

In *FCC v. WNCN Listeners Guild,*[94] decided in 1981, the Supreme Court expressly sanctioned the FCC's policy of "relying on market forces

85. *Action for Children's Television,* 821 F.2d at 744.
86. *See infra* notes 88-131 and accompanying text.
87. *See* Kunkel & Watkins, *supra* note 2, at 378.
88. *See, e.g.,* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 26-31 (1975).
89. *See generally* Fowler & Brenner, *supra* note 9.
90. B. OWEN, J. BEEBE & W. MANNING, JR., TELEVISION ECONOMICS 3 (1974).
91. Fowler & Brenner, *supra* note 9, at 209-10.
92. 309 U.S. 470 (1940).
93. *Id.* at 474-75.
94. 450 U.S. 582 (1981).

to promote diversity" in entertainment programming,[95] and noted that it was in accord with the 1934 Communication Act's goal of providing "the maximum benefits of [broadcasting] to all people of the United States."[96]

In the *1984 FCC Revision*, the Commission gave the beneficial effect of free market regulation as the main reason for the deregulation of television advertising:

> [W]e find that market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentive for licensees to become and remain aware of the needs and problems of their communities. Moreover, we are convinced that these forces will continue to hold levels of commercialization below our existing guidelines.[97]

The FCC maintained that if stations exceeded the tolerance levels of viewers by overloading commercial content, then viewers would turn the dial to another channel.[98]

The Commission also specifically rescinded its ban on program-length commercials,[99] stating only that:

> [s]everal commenters specifically noted that the elimination of the guideline should include elimination of the Commission's ban of program-length commercials.[100] Some suggested that the ability to more fully inform consumers is in the public interest, whether or not the information is technically an advertisement. The comments filed by [one of the commenters] suggested that program length commercials might help minority-owned stations to obtain a secure revenue base.[101]

The implication is that the FCC believes that market forces will effectively regulate program-length commercials. By extrapolation, then, if program X, a program-length commercial, is more popular than Y, a typical program, then the public (in this case, children) is demonstrating its preference and the public interest is therefore served.

The theory of effective regulation by market forces raises an interesting point: commercials are seldom as offensive to children (particularly young children) as they are to adults. Using the FCC's argument, unless some other consideration of the "public interest, convenience or necessity" should countervail (such as the "inherent deception of children" theory), the marketplace approach does allow children to watch what they want, and the public interest is served. If children choose to watch commercials, however distasteful this may be to parents, it can still be

95. *Id.* at 604.
96. *Id.* at 596.
97. 1984 FCC Revision, *supra* note 80, at 1077.
98. *Id.* at 1105.
99. *Id.* at 1102.
100. *Id.* at 1132.
101. *Id.*

said that the free market forces have given consumers what they want, and once again the public interest is served.

D. Abandonment of the "Trustee" Theory

The licensing strategem administered by the FCC since the 1934 Communications Act[102] was in part a reaction to the "airwave chaos" of the 1920s.[103] In *National Broadcasting Co. v. United States,*[104] Justice Frankfurter approved the scheme: "[t]here is a fixed natural limitation upon the number of stations that can operate without interfering with one another."[105]

Over the years, this necessity to choose who would receive a license led to the public trustee concept.[106] This concept was reflected in the *1974 FCC Report*, which noted that broadcasters, as public trustees of a scarce and valuable resource, have a duty to "further the educational and cultural development of America's children . . . ."[107]

The scarcity rationale, which justifies the trustee role of the FCC, has recently been under attack. Modern technology has greatly increased the options available to the viewing public. Furthermore, although many goods and services available to society are scarce, the sale and exploitation of these other resources are not regulated by a government agency acting as a public trustee.[108] Ideally, the highest bidder will make the most efficient use of these resources. Thus, the application of the trusteeship model is a substantial deviation from the normal allocation of scarce goods and services in society.[109]

As a practical matter, the scarcity rationale may be merely a historic remnant; even for a consumer owning only an ordinary VHF television, the number of stations available currently exceeds the number of daily newspapers available in large cities.[110] Add UHF television, cable television, VCRs, and satellite dish offerings to the viewer's choice and the scarcity theory of the 1920s becomes nostalgic fantasy rather than modern reality.[111]

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102. 47 U.S.C. §§ 151-609 (1982).

103. *See* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 5 (1959).

104. 319 U.S. 190 (1943).

105. *Id.* at 213.

106. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 399 (1969).

107. 1974 FCC Report, *supra* note 6, at 5.

108. For example, minerals, luxury cars, and entertainment.

109. Fowler & Brenner, *supra* note 9, at 221.

110. *Id.* at 225.

111. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 770, n.4 (1978) (Brennan, J., dissenting) ("[T]he opinions of my Brothers Powell and Stevens rightly refrain from relying on the notion of 'spectrum scarcity' to support their result.").

E. First Amendment Concerns

In 1974, the FCC addressed and summarily dismissed the first amendment claims of advertisers.[112] Without detailed discussion, the *1984 FCC Revision* cited the first amendment of the United States Constitution as one factor for the Commission's unwillingness to regulate levels of commercial messages.[113] The FCC noted that since the 1976 landmark case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[114] commercial speech has "significant First Amendment protection."[115]

In 1978, the FTC declared that the first amendment would not bar advertisements of sugared snacks to children.[116] While acknowledging the *Virginia State Board* holding, the Commission relied on *Ginsberg v. New York*[117] and *Erznoznick v. City of Jacksonville*[118] for the proposition that the first amendment rights of children are not as broad as those of adults.[119] In 1981, however, the FTC refused to reaffirm this sanguine conclusion, simply stating that because the FTC was not going to make any rules, the question of the constitutionality of such rules was moot.[120]

Several commentators have argued that the first amendment rights of broadcasters are a substantial bar to regulating children's television programming and advertising.[121] Absent specific case law, however, it is not clear that the broadening of first amendment rights for both broadcasting and commercial speech will sufficiently overcome the abridgement of those rights when children constitute the audience.

F. The General Policy Towards Deregulation

Since the 1970s, Congress has steadily decreased governmental regulation of businesses, thereby allowing market forces to operate.[122] This movement has been generally bipartisan, and deregulation has been ac-

112. 1974 FCC Report, *supra* note 6, at 10.

113. 1984 FCC Revision, *supra* note 80, at 1104.

114. 425 U.S. 748 (1976).

115. 1984 FCC Revision, *supra* note 80, at 1104.

116. 1978 FTC REPORT, *supra* note 1, at 237.

117. 390 U.S. 629 (1968).

118. 422 U.S. 205, 214 (1974).

119. 1978 FTC REPORT, *supra* note 1, at 246.

120. 1981 FTC Final Report, *supra* note 13, at 4.

121. *See, e.g.*, Versfelt, *Constitutional Considerations of the Children's Television Act of 1988: Why the President's Veto Was Warranted*, 11 HASTINGS COMM/ENT L.J. 625 (1989); O'Brien, *The Responsibility of the Electronic Press to Juvenile Audiences*, 15 SW. U.L. REV. 653 (1985).

122. P. DIFFENDORFER, *Proposed Federal Legislation and the Next Decade of Television*, LAW AND TELEVISION IN THE 80'S 237 (1983).

complished even when both industry management and labor have resisted it.[123]

The *1984 FCC Revision* explicitly cited conformity with the Regulatory Flexibility Act of 1980[124] and the Paperwork Reduction Act of 1980[125] as grounds for the FCC's decision to withdraw advertising guidelines.[126] The Regulatory Flexibility Act requires federal agencies to achieve their statutory goals without causing undue burden to the public, particularly with regard to the significant economic impact that compliance with regulations would have on small businesses.[127] Rule-making agencies must publish analyses showing that they have weighed the necessity for these rules against the economic burden to the regulated entity, and that the rules are the most efficient and least burdensome required to achieve their statutory ends.[128] While acknowledging that many local television stations are small businesses, the FCC did not explain how application of the proposed guidelines restricting children's television advertising would be economically burdensome to them. Instead, the FCC simply invoked "burdensome compliance costs" as a potential problem with the regulation of televised advertising.[129]

The Paperwork Reduction Act of 1980 requires that each federal agency appoint a senior officer to ensure that paperwork, both that generated within the agency and that required by the agency from regulated entities, be kept at a minimum.[130] Although the *1984 FCC Revision's* abandonment of logging requirements clearly does eliminate some paperwork, the Commission did not explain how adherence to advertising guidelines would affect the volume of paperwork either for the FCC or for broadcasters.[131]

In view of this lack of specificity on the part of the FCC, and more particularly in view of the passage of the proposed 1988 Children's Television Advertising Practices Act through both houses of Congress,[132] it seems that Congress does *not* intend its general deregulatory posture to extend to the provisions of the proposed legislation.

123. *Id.* at 244-45.

124. 5 U.S.C. § 601 (1980).

125. 44 U.S.C. § 3501 (1986).

126. 1984 FCC Revision, *supra* note 80, at 1080.

127. 5 U.S.C. § 601 (1980).

128. *Id.* §§ 602-604.

129. 1984 FCC Revision, *supra* note 80, at 1080.

130. 44 U.S.C. § 3506 (1986).

131. *See* 1984 FCC Revision, *supra* note 80, at 1080.

132. *See supra* note 15 and accompanying text.

V
Unresolved Problems

The above analysis outlined the main arguments raised for and against the regulation of children's television advertising. ACT, other consumer groups and Congress have identified commercialism as the enemy,[133] whereas the FCC has identified marketplace forces as ultimately beneficial to both the children's and the public's interest.[134]

The deregulators start with the premise that television is a for-profit business. A merchant, to be successful, must follow the wishes of the public and provide what is demanded.[135] Unrestricted market forces will serve the public interest with maximum efficiency.

Applied to children's television, this proposition argues that the advertiser, to be successful, must sponsor the programs that children most want to see. For example, if *Go-Bots*[136] and *Sesame Street*[137] were aired simultaneously, the sponsors of *Go-Bots* could succeed only by producing a more popular program than *Sesame Street*. If the child would rather watch *Go-Bots* than *Sesame Street*, it follows that, from the child's point of view, the marketplace is operating in the child's interest. It is irrelevant that the parent might have a different perspective.

In contrast, supporters of regulation claim that the public interest cannot be served by following only the wishes of the children. Representative Bruce, introducing the proposed 1988 Children's Television Advertising Practices Act into the House of Representatives, professed a general belief that allowing market forces to operate in business was essential to the economy.[138] At the same time, he insisted that "[r]elying on a marketplace of children to determine the course of children's programming is about as wise as allowing a marketplace of children to determine their courses in school."[139]

Two main reasons have been advanced to support the view that regulations despite the wishes of children are nevertheless in the public interest: first, quality programming cannot be determined by reference to the children's wishes alone, and second, children's television advertising is inherently deceptive.[140] The first contention, that quality programming for children should be determined in part by adults, implies an edu-

133. *See supra* note 26 and text accompanying note 40.
134. *See* 1984 FCC Revision, *supra* note 80, at 1080.
135. Fowler & Brenner, *supra* note 9, at 231-33.
136. A popular commercially sponsored children's TV show.
137. A popular governmentally funded children's TV show.
138. 133 CONG. REC. E3585 (daily ed. Sept. 17, 1987) (statement of Rep. Bruce).
139. *Id.*
140. Charren, *supra* note 24, at 1252-53.

cational approach to television. Peggy Charren, President of ACT, said: "It's gotten so bad, that if you want to produce a program on the life of Helen Keller, you first have to talk Mattel into making a Helen Keller doll."[141] The implication is that children *should* learn about the life of Helen Keller from television, whether or not they want to.

It cannot be seriously doubted that educational television programs, best exemplified by *Sesame Street*, are of great benefit to the public.[142] Studies suggest that children who watch this type of program have improved language and arithmetic skills, and learn socially encouraged forms of behavior such as tolerance for diverse ethnic groups and positive attitudes towards school.[143] This Note, however, is concerned only with commercial television, where there are no public funds, and therefore no motive to educate on the part of the producer. In television, as in most businesses, altruism is usually unprofitable. Merely limiting the amount of advertising, and therefore the funds available for children's programs, will not stimulate educational programs. Rather, this action would limit the ability of stations to offer children a wide choice of programming.

The second reason why market forces, while responsive to the demands of children, may yet be contrary to the public interest is the argument that televised advertising directed at children is inherently deceptive.[144] The sponsors of the proposed 1988 Children's Television Advertising Practices Act took this position,[145] as does ACT. Since 1974, the FTC and FCC have consistently ignored this argument.[146]

This is one argument that is beyond attack. There is no first amendment protection for deceptive, or even misleading advertising.[147] The Supreme Court has observed that "[t]he First Amendment . . . does not prohibit . . . insuring that the stream of commercial information flow[s] cleanly, as well as freely."[148] Moreover, it has long been recognized that deceptive advertising will not be adequately regulated by the marketplace, because the efficiency of marketplace forces depends on the consumer having accurate information.[149] Since the establishment of the

141. *Id.* at 1258.

142. *See* Roberson, *Mandatory Programming Rules for Children's Television*, 3 HASTINGS COMM/ENT L.J. 701, 703 (1981).

143. *Id.*

144. *See supra* note 40 and accompanying text.

145. *See* Remarks of Sen. Tim Wirth (D-Colo.), 134 CONG. REC. S955 (daily ed. Feb. 18, 1988).

146. *See supra* notes 66 and 85 and accompanying text.

147. *Virginia State Board*, 425 U.S. 748, 771.

148. *Id.*

149. *See* Frazer, *FTC Enforcement of Deceptive Advertising*, 1985 ANN. SURV. OF AM. L. 537.

FTC in 1914, it has been evident that a consumer's common-law fraud remedy is not enough to deter deceptive advertising, and that specific statutory regulations are necessary to ensure a functional marketplace.[150]

VI
Possible Solutions

Congress may require the FTC or FCC to reinstate regulation of children's television advertising. However, in light of the demonstrated unwillingness of both of these bodies to enforce existing rules or to promulgate new ones, it appears neccessary to look for alternatives. The obvious sources are federal and state unfair advertising statutes.

In the federal arena, section 43(a) of the Lanham Act[151] provides a civil remedy to any person who believes that he or she is likely to be damaged by the use of false description or representation in a commercial transaction.[152] Although the plain meaning of the Act gives a remedy to anyone "who believes he is likely to be damaged" by deceptive advertising, the leading case of *Colligan v. Activities Club of N.Y., Ltd.*,[153] decided in 1971, restricted the right to sue to injured business competitors.[154] More recently, however, this restriction has been somewhat eroded.[155] Currently, the plaintiff need only be economically damaged by the deceptive advertising.[156] However, standing to sue is still reserved to the class of "commercial plaintiffs," a category that does not yet include consumers.[157]

Commentators have seen the expansion of section 43(a) as a promising development for potential litigants, replacing the void left by governmental deregulation.[158] This view is supported by dicta in recent decisions critical of the *Colligan* rule,[159] but currently the non-commercial consumer has no standing to sue under section 43(a) of the Lanham Act.[160]

Another possible solution is state unfair advertising statutes. For example, California Business and Professions Code section 17500 forbids

150. *Id.* at 546-47.

151. 15 U.S.C. §§ 1051-1127 (1988).

152. *See* 15 U.S.C. § 1125(a).

153. 442 F.2d 686 (2d Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971).

154. *See, e.g.*, Chamberlain v. Columbia Pictures Corp., 186 F.2d 983 (9th Cir. 1951).

155. Thorn v. Reliance Van Co., 736 F.2d 929 (3d Cir. 1984); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981).

156. *Id.*

157. *See* Keller, *Private Regulation of Advertising Under Section 43(a) of the Lanham Act*, 1985 ANN. SURV. AM. L. 563, 571.

158. *See* Kotler, *And Now for This Commercial Brake*, 5 CAL. LAW. 29, 31 (1985).

159. *See, e.g., Thorn*, 736 F.2d at 932.

160. Keller, *supra* note 157, at 571.

any seller of goods or services from using any advertising device which is misleading.[161]

In *Committee on Children's Television, Inc. v. General Foods Corp.*,[162] the California Supreme Court held that any member of the public could sue an advertiser under section 17500, and required only a showing that "members of the public are likely to be deceived . . . [and that] [a]llegations of actual deception, reasonable reliance, and damage are unnecessary."[163] One of the advertiser's defenses in that case, which involved the children's advertising of sugared breakfast cereals, was that although the children may be deceived, it is the parents who buy the product. The court rejected this argument, concluding that "it should be sufficient that defendant makes a misrepresentation to one group intending to influence behavior of the ultimate purchaser."[164]

At first blush, it seems that advertising directed at children too young to recognize that they are watching a commercial pitch is "a misrepresentation to one group intended to influence the ultimate purchaser." Also clearly within the ambit of the statute are advertisements that falsely represent the function or benefit of the product. More problematic, however, is the fate of the program-length commercial. If it is directed at children who are old enough to know that they are watching a commercial pitch, and if there is no deception as to what is being advertised, then no misrepresentation would be involved.

There have been no reported decisions involving television advertising directed at children since *General Foods,* but the strong commitment to consumer protection demonstrated in that case suggests further litigation between consumers and advertisers is forthcoming.

VII
Conclusion

ACT and other proponents of regulating children's television advertising have failed to convince the FTC or FCC of their thesis that such advertising is inherently deceptive or unfair to children. The FTC has declined to regulate because it would be impractical, while the FCC maintains that marketplace forces will deal with the problem and will act in the children's best interests. Both these arguments sidestep ACT's proposition.

161. CAL. BUS. & PROF. CODE § 17500 (Deering 1979).

162. 35 Cal. 3d 197, 197 Cal. Rptr. 783 (1983).

163. *Id.* at 211, 197 Cal. Rptr. at 798.

164. *Id.* at 219, 197 Cal. Rptr. at 808.

Congressional supporters of regulation have explicitly adopted ACT's argument, without giving reasons.[165] Thus, if a subsequent version of the unsuccessful 1988 Children's Television Advertising Practices Act were to be successfully enacted, the argument would be conclusorily decided in favor of ACT.

Children are notoriously dissatisfied by conclusory reasoning. If a parent says, "You can't have that; it's bad for you," the child will inevitably reply, "Why?" If the parent then says, "Because you're being duped," the child will typically answer, "How?" At this point in the dialogue, Congress, acting as national nanny, is prepared to conclude, "Because we say so." Applying this analogy to the subject at hand, the best solution is to litigate the issue of deceptive advertising. Although many state statutes allow consumers to sue advertisers for deceptive advertising, section 43(a) of the Lanham Act does not.

Another reason to address the deception theory in depth is that it will allow the remedy to be tailored to the problem. If all television advertising directed at children is found to be inherently deceptive, then it makes more sense to impose a total ban, rather than merely limit the amount of commercial time. The congressionally approved regulations, in this sense, contain an uneasy paradox; if, as stated, television advertising directed at children is inherently deceptive, why allow children to watch it a given percentage of the time? Why not ban it completely? Accepting it as a necessary evil may seem practical, but to admit that *some* deception of children is necessary to the existence of children's programming is at best embarrassing, at worst cynical. If it is decided that not all television advertising is deceptive, but only certain practices, then these practices can be enjoined.

Broadcasters have offered the argument that viewing advertisements helps children prepare for their future lives as consumers. Though this argument seems somewhat Orwellian, it is worth noting that children exposed to large amounts of television advertising do develop a healthy cynicism for the commercial message.[166] If the public does not care enough to pay for the kind of programs that they want children to watch, and if the content of commercial television is not deceptive within the definition of federal or state deceptive advertising statutes, then children should be allowed to watch what they want.

It is not enough to regulate children's television advertising simply because it is distasteful, but it is clearly necessary to ban advertising that is deceptive. Because federal and state statutes, and related case law,

165. *See supra* text accompanying note 145.

166. Bever, Smith & Johnston, *Young Viewers Troubling Responses to Television Advertisements*, 1985 HARV. BUS. REV. 109 (1985).

have established definitions of deceptive advertising, the courts are the proper fora to determine precisely which practices in children's television are deceptive, and why. Congress should not preempt this important debate by summarily enacting regulations.